FOR ARGUMENT

MOTION FILED
AUG 3 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-695

BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, *et al.*,

Petitioners,

—v.—

CHARLOTTE HOROWITZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, THE ASSOCIATION FOR WOMEN IN SCIENCE, AND THE WOMEN'S EQUITY ACTION LEAGUE EDUCATIONAL AND LEGAL DEFENSE FUND, FOR LEAVE TO FILE BRIEF *AMICI CURIAE*; BRIEF *AMICI CURIAE*

JOEL M. GORA
American Civil Liberties Union
22 East 40th Street
New York, New York 10016
Attorney for Amici Curiae

ELLEN DRESSELHUIS
c/o Women's Equity Action League
Educational and Legal Defense Fund
733 15th Street, N.W.
Washington, D.C. 20005
Of Counsel

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-695

BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, et al.,
Petitioners,

v.

CHARLOTTE HOROWITZ,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, THE ASSOCIATION FOR WOMEN IN SCIENCE, AND THE WOMEN'S EQUITY ACTION LEAGUE EDUCATIONAL AND LEGAL DEFENSE FUND, FOR LEAVE TO FILE BRIEF AMICI CURIAE

The American Civil Liberties Union, the Association for Women in Science, and the Women's Equity Action League Educational and Legal Defense Fund respectfully move, pursuant to Rule 42 of this Court's Rules, for leave to file the within brief amici curiae. Counsel for the respondent has consented to the filing of this brief;

counsel for the petitioners have refused consent. */

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated solely to defending the safeguards of the Bill of Rights. The ACLU believes, with Mr. Justice Douglas, that "[i]t is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference berween rule by law and rule by whim or caprice." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 179 (1951). Because of this belief, the ACLU has participated in hundreds of cases involving the due process rights of students, teachers, and governmental employees, in this and other courts.

The Association for Women in Science is a national organization dedicated to promoting equal opportunities for women to enter the professions and to achieve their career goals. A growing awareness of the magnitude of sex discrimination in the professions and personal experiences of unequal opportunities led the founders to form the organization in 1971. The Association affirms the intrinsic

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*/ A copy of the letter from respondent is being lodged with the Clerk.

ability of women to function as professional scientists at a level of competence equal to that of men. The Association is composed of women in the physical, biological, social, medical, nursing, dental and veterinary sciences, teachers of science and engineering, and men who support the aims of the Association.

The Women's Equity Action League Educational and Legal Defense Fund is a non-profit, tax exempt association organized to provide legal assistance and services to insure full participation and recognition of individuals in all facets of American life without discrimination based on sex. The Fund has a history of supporting fair treatment of women in the medical profession.

The issues in this case involve important questions concerning whether due process protection should be afforded to a woman medical student expelled from school on the eve of graduation for reasons of personal conduct. We would hope that our analysis of those issues will be of assistance to the Court in resolving the questions before it. And it is in order to present that analysis that amici respectfully move for leave to file this brief.

Respectfully submitted,

JOEL M. GORA
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorney for Amici Curiae

August 8, 1977

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 76-695

BOARD OF CURATORS OF THE
UNIVERSITY OF MISSOURI, et al.,
Petitioners,

v.

CHARLOTTE HOROWITZ,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERITES UNION, THE ASSOCIATION FOR WOMEN IN SCIENCE, AND THE WOMEN'S EQUITY ACTION LEAGUE EDUCATIONAL AND LEGAL DEFENSE FUND, AMICI CURIAE

Interest of Amici Curiae

The interest of amici curiae is set out in the motion preceding this brief.

STATEMENT OF THE CASE

The respondent, Charlotte Horowitz, was expelled from the University of Missouri-Kansas City School of Medicine in July, 1973, a decision which, as the Court of Appeals found, effectively forecloses her from a medical career. (A. 53-54).*/ At no time was she afforded a hearing or the opportunity to appear before the school authorities who expelled her, and at no time during the dismissal procedure was she allowed to confront the evidence against her. (A. 53). It is in this context that the Court is being asked to decide important issues under the Fourteenth Amendment. But those issues do not turn on whether the decision to dismiss the respondent from medical school was proper; they turn instead on whether that decision should have been buffered by due process safeguards. The facts relevant to determining that issue are as follows.

Charlotte Horowitz entered UMKC Medical School as an advanced standing student in 1971. She entered with superior test scores and recommendations, as well as five years of study and work in psychopharmacology at the National Institute of Health in Bethesda, Maryland. (A. 48-49).

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*/ "A._____" refers to the Appendix filed with the Court.

During her first year, Horowitz received credit for all courses taken, and her performance was felt to be outstanding by her docent, the supervising faculty member in closest contact with her. (A. 50). However, faculty members in one of her courses, "criticized her lack of patient rapport and 'expertise in coming to the fundamentals of the clinical problem,' erratic attendance, and poor personal hygiene." (A. 50). Horowitz was informed of these criticisms by her docent, without being shown the formal course evaluation. (A. 50).

In a letter dated July 5, 1972, the Dean told Horowitz that, although she was being advanced to her final year, she was on probation because of deficiences in her conduct and appearance. He noted that she had to improve her relationships with other by "keeping to established schedules; meeting all clinical responsibilities on time and gracefully; attending carefully to personal appearance, including hand washing and grooming; participating appropriately in the activities of the School; and directing criticisms and suggestions maturely to [faculty members] ...." (A. 50-51). The letter also indicated that failure to meet certain standards of conduct "is incompatible with continued progress and graduation." (A. 51).

In December of that year, the Council on Evaluation recommended that Horowitz not graduate on schedule in June, 1973. The Coordinating Committee approved this recommendation, followed by the Dean. (A.51).

In a letter dated February 7, 1973, the Dean informed Horowitz that she had failed to improve in the areas noted in the July 5, 1972, letter and would not graduate in June. He advised her that absent marked improvement in "clinical competence, peer and patient relations, personal hygiene and ability to accept criticism," she would be expelled from the medical school after May. (A. 51-52).

Although no procedures had been specified, Horowitz was told she could "appeal" the decision that she would not graduate in June by taking a set of oral and practical examinations, pursuant to regulations promulgated in November, 1972. (A. 52). This was the first time such examinations had been administered. The Dean established procedures to be followed for tallying a majority opinion of the examiners to be submitted to the Council on Evaluation, or for calling together the panel if there were no clear majority. But these procedures ultimately were not followed, because even though there was no clear majority opinion, the panel was not convened. (A. 52). Instead, the individual recommendations were submitted to the Council on Evaluation. On May 1, 1973, the Council reaffirmed its view that Horowitz should not be allowed to graduate in June, a decision approved by the Coordinating Committee and the Dean. (A. 53).

On May 28, 1972, the Council on Evaluation further recommended that Ms. Horowitz be expelled. As the Eighth Circuit noted, "the appeal procedure...related only to the decision not to graduate Horowitz, and not to the decision to expel her." (A. 55). That decision was also approved by the Coordinating Committee. On July 3, 1973, the Dean notified the respondent that she was no longer a student, and the University Provost for the Health Sciences denied her request for a reversal of this decision.

The stated reason for her expulsion was failure to improve in four areas described in the Dean's July 5, 1972 letter: "clinical competence, peer and patient relations, personal hygiene and ability to accept criticism." (A. 232). As the Council on Evaluation had noted previously in its December 25, 1972 meeting, "This issue is not one of academic achievement, but of performance, relationship to people and ability to communicate." (A. 218). Indeed, throughout her career at UMKC Medical School, Horowitz's academic performance provided absolutely no basis for the dismissal. She received credit in every course except one, which she did not complete until after it was determined that she would not graduate. (A. 49).

Because of her expulsion, Horowitz was unable to accept employment which had been offered her at the University of North Carolina, because it was conditioned upon her obtaining her medical degree. (A. 53-

54). The Eighth Circuit noted that it was "uncontroverted that Horowitz's dismissal from medical school will make it difficult or impossible for her to obtain employment in any medically related field or enter another medical school." (A. 53-54). She has thus been effectively foreclosed from pursing a medical career.

SUMMARY OF ARGUMENT

The petitioners have suggested that the decision below involves an intolerable kind of judicial interference in matters of academic judgment and expertise. It does not. The issue in this case is not whether Ms. Horowitz is qualified to receive a medical degree. Rather the issue is whether the petitioners' determination that she is not so qualified should be subject to due process safeguards. In the context of this case, the answer to that question must be in the affirmative.

I.

The actions taken by the petitioners against Ms. Horowitz - dismissing her from medical school, stigmatizing her in the process of doing so, and thereby effectively foreclosing to her any opportunity to pursue employment in her chosen field of endeavor - invaded interests protected by the Fourteenth Amendment. Wisconsin v. Constantineau, 400 U.S. 433 (1971); Goss v. Lopez, 419 U.S. 565 (1975); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). The state officials have done far more than just defaming the respondent; they have stigmatized her plus depriving her of the ability to pursue a profession. See Paul v. Davis, 424 U.S. 693 (1976). In these circumstances, due process was required.

II.

In order to determine what process was due the respondent, the Court must take into account the substantial harm done to Ms. Horowitz, the fact that the underlying issues are amenable to resolution through a hearing process, and the total lack of any substantial state interest in summary adjudication of those issues. Goldberg v. Kelly, 397 U.S. 254 (1970); Morrissey v. Brewer, 408 U.S. 471 (1972); Goss v. Lopez, supra. The question of whether Ms. Horowitz should remain in medical school is an important one - for the University, no less than for the respondent - and one which should be buffered by the due process safeguards of a university hearing at which the charges can be fully and fairly heard.

III.

This traditional due process analysis should not be displaced because it arises in an academic setting. Affording due process to Ms. Horowitz does not mean that the judiciary will be embroiled in disputes over examination grades. The charges against Ms. Horowitz basically involve the kinds of factually verifiable allegations of misconduct that are traditionally tested through fair procedures. E.g., Goss v. Lopez, supra, Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961). And the relief she seeks does not require the Court to

second-guess academic personnel, but only to decide whether the Constitution requires those academic personnel to give Ms. Horowitz a hearing.

ARGUMENT

I. THE ACTIONS TAKEN AGAINST THE RESPONDENT INVADED INTERESTS PROTECTED BY THE FOURTEENTH AMENDMENT.

The petitioners have deprived the respondent of interests cognizable under the Fourteenth Amendment by dismissing her from their medical school, stigmatizing her in the process of doing so, and thereby foreclosing to her any opportunity to take advantage of employment opportunities in medicine fields.

Petitioners have expelled respondent from medical school upon charges of deficiencies in "clinical competence, peer and patient relations, personal hygiene, and ability to accept criticism." These are not confidential charges that would never have become public knowledge if not for this litigation. Cf., Bishop v. Wood, 426 U.S. 341 (1976). The Eighth Circuit noted that "UMKC's own application forms require that a student fully explain the reasons they were required to leave 'any college, graduate or professional school...because of deficiencies in either conduct or scholarship.'" (A. 54). Thus, quite apart from this litigation, the charges and actions against the respondent still would have reached medical schools considering her. Indeed, the Court below found it to be "uncontroverted that Horowitz's dismissal from medical school will make it difficult or impossible for her to obtain employment

in a medically related field or to enter another medical school." (A. 53-54). */

It is thus clear that the petitioners have harmed respondent's good name and professional reputation by expelling her from medical school for the reasons cited above. In addition to their charge of clinical incompetence, they have labelled her a person who has unsatisfactory relations with peers and with patients, one who is physically unclean and unkempt, and one who is unable to accept criticism. In sum, they have taken punitive action against her and in the process they have condemned her proficiencies, her personality, and her appearance, thereby imposing a "badge of disgrace" upon her. Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).

In Paul v. Davis, 424 U.S. 693 (1976), the court made it clear that the state infringes a liberty interest protected by

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*/ Similarly, the court in Wellner v. Minnesota State Junior College Board, 487 F.2d 153 (8th Cir. 1973) affirmed that a college's failure to reappoint a nontenured teacher, when taken together with the inclusion in his file of charges that he was a racist, where prospective employers would have likely access to that information, infringed a liberty interest such that a hearing was necessary.

the Fourteenth Amendment when it stigmatizes an individual so as to alter his legal status by depriving him of a right previously held. Here, unlike in Davis, we do not merely have defamation by a state official, without more. Petitioners' stigmatization of respondent has deprived her of both the right to pursue a medical degree and the right to take advantage of opportunities for employment in her field of endeavor.*/ In Paul v. Davis, in holding that defamatory action by the state, without more, does not deprive the individual of "liberty," the Court also made clear that when the imposition of such stigma is coupled with adverse governmental action, for example, depriving a person of the opportunity to buy a drink, Wisconsin v. Constantineau, supra, to continue teaching at a university, Board of Regents v. Roth, 408 U.S. 564 (1972), or to continue being a student, Goss v. Lopez, 419 U.S. 565 (1975), then Fourteenth Amendment interests are very much involved. In this

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*/ It should be noted that respondent's opportunity to work in the medical field, available to her prior to her expulsion, has been effectively extinguished. Before entering medical school, Ms. Horowitz worked for five years in a medically-related job at the National Institute of Health at Bethesda, Maryland. The Eighth Circuit noted that she is now foreclosed not only from work as a medical doctor, but also from work in a medically-related field.

case there is clearly "stigma plus," since Ms. Horowitz was stigmatized by the state as part of the process of expulsion from medical school thus foreclosing employment opportunities. It follows that petitioners have invaded interests protected by the Fourteenth Amendment.

This conclusion is reinforced by the fact that the respondent's ability to obtain a medical degree derives from the fact that the degree is an eligibility requirement for attaining the status of a physician. By making it practically impossible for respondent to obtain the degree, petitioners have rendered her ineligible for employment in the capacity of a physician and in other medical capacities that require such a degree. The ability to establish one's eligibility for a benefit is protected as a liberty interest in numerous contexts. Board of Regents v. Roth, 408 U.S. 564, 577 (1972), citing Goldberg v. Kelly, 397 U.S. 254 (1969). "The Court has held...that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities 'in a manner...that contravene[s]...Due Process,' Schware v. Board of Bar Examiners, 353 U.S. 232, 238, ..." (1957). Board of Regents v. Roth, supra, 408 U.S. at 574. As a prerequisite to the practice of certain medical careers a medical degree is like a license. A state cannot deny a person a license to practice his chosen profession absent procedural due process. Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Goldsmith v. United States Board of Tax Appeals, 270

U.S. 117 (1926).

As to respondent's right to take advantage of employment opportunities in her field of endeavor, the opinions of this Court have established that when the state denies an individual "the right to engage in any of the common occupations of life..." then the state infringes upon a liberty interest which is protected by the Fourteenth Amendment. Roth, supra, at 572, quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923). See Bishop v. Wood, supra. Petitioners have denied Horowitz the right to work as a physician and in all probability she now is foreclosed from any medically-related career. Horowitz v. Board of Curators of the University of Missouri, 538 F.2d 1317, 1320 (8th Cir. 1976). It is certain that, unlike the original plaintiffs in Bishop, supra, and Roth, supra, Horowitz does not "remain[ ] as free as before to seek another" medical school position or job in her field. Bishop v. Wood, supra, 426 U.S. at 348, quoting Board of Regents v. Roth, 408 U.S. 564, 575 (1972).

In Goss v. Lopez, supra, the court based its holding, that students suspended from public school in Ohio were thereby deprived of liberty within the meaning of the Fourteenth Amendment, upon the anticipation that "If sustained and recorded, those charges [underlying suspension] could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher

education and employment." 419 U.S. at 575. The court noted that students would be asked to disclose their suspensions on college applications. Id. n. 7. The consequences the Court feared in Goss have befallen Horowitz. The state has stigmatized her to the point that she is foreclosed from completing medical school, obtaining her medical degree, and working as a physician or in any medically-related field.

In a virtually identical case, Greenhill v. Bailey, 519 F.2d 5, 7, 8 (8th Cir. 1975), the court held that in communicating to another organization that it had expelled a medical student for "lack of intellectual ability or insufficient preparation" the state had "deprived [the student] of a significant interest in liberty, for it admittedly 'imposed on him a stigma or other disability that foreclose[s] his freedom to take advantage of other opportunities.' Board of Regents v. Roth, supra, 408 U.S. at 573..." In the instant case, petitioners' charges against respondent denigrate her clinical proficiencies, personality, appearance, personal habits and "ability to accept criticism." (Appendix, e.g., 221)(emphasis supplied).

In short, the petitioners derogatorily labelled the respondent as incapable of obtaining a medical degree, expelled her from medical school, and thereby effectively precluded her from pursuing a professional career in the medical field. If these actions by agents of the State are not deemed to

infringe interests protected by the Fourteenth Amendment, then it is hard to imagine any form of adverse State action - short of incarceration - that would.

II. RESPONDENT DID NOT RECEIVE THE PROCESS THAT WAS "DUE" IN THE CIRCUMSTANCES OF THIS CASE.

"'Once it is determined that due process applies, the question remains what process is due.'" Goss v. Lopez, supra, 419 U.S. at 577, quoting Morissey v. Brewer, 408 U.S. 471, 481 (1972). The process due in this case is adequate notice of the charges and a meaningful hearing thereon. Respondent was entitled to a hearing because she had a substantial interest in avoiding an unfair or mistaken dismissal from medical school, her dismissal rested on factual grounds as to which there is disagreement and whose character can be colored by a witness' point of view, and the petitioners can claim no significant interest in expelling her without a hearing. Given these circumstances, a hearing is a constitutionally indispensable tool for arriving at a fair and correct determination.

The petitioners claim that the respondent received all the process that was due and that she was "treated with fairness" (Pet. Br., p. 25). In making that argument, they contend that since the governmental function at issue "is that of educating

future medical doctors of this nation and the awesome responsibility to the general public of graduating only those individuals who are safe and competent physicians" (Pet. Br., p. 25), the nature of the process that is due must be tailored accordingly. The respondents, however, misconceive the kinds of interests to be weighed and are asking the Court to balance the wrong factors. The determination of what process is due involves balancing the interest of the government in summary adjudication against the interest of the individual in not being deprived of the "liberty" or "property" interests in question. "The extent to which procedural due process must be afforded the [welfare] recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss'...and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Morrissey v. Brewer, supra, 408 U.S. at 481-84. Here, the respondent has been "condemned to suffer grievous loss" and the state's interests, though weighty, do not require summary adjudication to be vindicated. The fact that the state's interest in graduating competent doctors is weighty is beside the point. The question is whether requiring a hearing for the respondent will jeopardize that interest. We submit that it will not.

"'[T]he fundamental requisite of due process of law is the opportunity to be heard'..." Goss v. Lopez, supra, 419

U.S. at 579. "[T]he nature of the hearing will depend on appropriate accomodation of the competing interests involved," in light of the risk of an erroneous deprivation under the current procedures and the utility of additional procedural safeguards for reducing that risk. Id. at 579-580; Mathews v. Eldridge, 424 U.S. 319 (1976).

Respondent's interest is that of the students in Goss, namely, "to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences." 419 U.S. at 579. It is logical to assume that petitioners share with the Ohio public schools in Goss an interest in conserving financial and administrative resources and in avoiding interference with the educational process as well as in avoiding unwarranted student dismissal. */

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*/ As students progress through medical school, the institution invests in them in a myriad of ways. The school develops an obvious interest in seeing those students complete their medical education, contribute to the field of medicine, and bring credit to what is in petitioners' case a relatively young school. The school also has a stake in seeing that students adopt values suitable to their future positions of responsibility and which reflect well on the school. Thus, the school has an interest in seeing that dismissals are neither mistaken nor unfair.

In analyzing the possibility of unfair or mistaken dismissal in Goss, the Court considered the fact that those in authority to suspend students "frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed." 419 U.S. at 580. Similarly, in the case at bar, the Council on Evaluation based its recommendation for dismissal upon the reports and advice of others as contained, for example, in docents' recommendations (See A. 115-117). Through the Council's Minutes the information was communicated to the Coordinating Committee for final action (A. 79-80). Also, the record documents disagreement on facts fundamental to the charges which constituted the grounds for respondent's dismissal. (Compare, e.g., A. 68-69 with A. 156). The Court's depiction of the factors under consideration in Goss therefore applies here as well.

"Central to the evaluation of any administrative process is the nature of the relevant inquiry." Mathews v. Eldridge, supra, 424 U.S. at 343. A charge such as poor p -sonal hygiene, unsatisfactory relations with peers or inability to accept criticism "depends upon a collection of the facts...easily colored by the point of view of the witnesses." Dixon v. Alabama State Board of Education, 294 F.2d 150, 159 (5th Cir. 1961). There is no "assurance of rightness" in an administrative determination of inability to accept criticism, where the accused individual has no opportunity to relate her side of the encounter or encount-

ers in question. Goss v. Lopez, supra, 419 U.S. at 580.

It is obvious that there is a substantial probability of mistake and unfairness in dismissing a student without a hearing in a case such as the one at bar. "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights..." Id. at 580. In the instant case, as in Goss, a hearing is capable of reducing the risk of mistaken or unfair expulsion, by allowing the decision-making authorities to work from a complete account of the facts and by affording "the student...the opportunity to characterize [her] conduct and put it in what [s]he deems the proper context." Id. at 584; see also Morrissey v. Brewer, supra, 408 U.S. at 484. Faced with the same comparative weight of student and school interests, and a situation in which a hearing similarly promised to reduce an otherwise significant risk of unfair or mistaken student dismissal, the Goss Court concluded that due process mandated that the student receive notice and an opportunity to be heard. Due process demands no less here.

Because subjective accounts of the controlling facts are at issue, the hearing mandated in the instant case should, at the very least, take place before the official body making the relevant findings of fact and determining the action to be taken. See Goss v. Lopez, supra. Ms.Horowitz's conferences with the Dean and other individual

school administrators do not satisfy the due process hearing requirement. As the court said in Esteban v. Central Missouri State College, 277 F.Supp. 649, 651 (W.D. Mo. 1967):

> ... the critical defect in the hearing procedure used by the college was the fact that the person to whom the students were permitted to make their explanation or showing...was only one of a number of persons on the board which made the recommendation of suspension. It is imperative that the students charged be given an opportunity to present their version of the case and to make such showing as they desire to the person or group of persons who have the authorized responsibility of determining the facts of the case and the nature of the action, if any, to be taken.

The Eighth Circuit later noted with approval the District Court's handling of the procedural due process questions in the case. Esteban v. Central Missouri State College, 415 F.2d 1077, 1089 (8th Cir. 1969).

Finally, we would note that the court below went only so far as to declare Horowitz's dismissal without a hearing to be in violation of the Fourteenth Amendment, and to declare that she should be "accorded all other procedural due process rights." The court did not specify whether due process

mandated a hearing before dismissal. However, we would submit that the hearing mandated in the present case should occur prior to expulsion because the state has no significant interest in summary dismissal, while the student has a substantial and overriding interest in avoiding that. See Goldberg v. Kelly, supra, 397 U.S. at 262-3. After an extended period during which there were numerous deliberations of the authorities before whom Horowitz should have had a hearing, petitioners can hardly be heard to protest the necessity of dismissal before rather than after a hearing. Cf., Mathews v. Eldridge, 424 U.S. 319 (1976). Moreover, the respondent has an obvious interest in avoiding an interruption in studies that could jeopardize a semester or lengthen her schooling, as well as an interest in avoiding a compelled absence from school which may have to be explained subsequently to other schools or employers. In such a case, due process requires a hearing prior to the adverse governmental action.

III. THE PARTICULAR CONTEXT OF THIS CASE DOES NOT JUSTIFY A DEPARTURE FROM TRADITIONAL DUE PROCESS ANALYSIS OR A DENIAL OF DUE PROCESS PROTECTION.

We think it clear that the traditional due process analysis set forth above requires the conclusion that the University officials deprived Ms. Horowitz of due process of law in taking the actions against her in the

manner that they did. Running throughout the petitioners' attempt to refute this traditional analysis is the general theme that there should be no judicial interference with academic decision-making where students are concerned. The impression is sought to be created that if due process is accorded to Ms. Horowitz, judges throughout the country will spend their time grading examination papers of students from kindergarten through medical school. Resolution of the issues in favor of the respondent will have no such effect.

The issue in this case is not whether Ms. Horowitz is qualified or competent to be a doctor. Rather, the issue is whether the University's decision that she is not, under the circumstances here, should have been surrounded by due process safeguards. For the following reasons, an affirmative answer to that question will not inevitably lead to the kind of ongoing interference with academic responsibility which the petitioners suggest.

A. The charges against respondent are primarily based on personal misconduct, not academic performance.

It is settled that where the state attempts to dismiss a student from a tax-supported school or institution of higher learning upon charges of misconduct, the state must accord the student some form of procedural due process. Goss v. Lopez, supra; Dixon v. Alabama State Board of

Education, supra. Since the petitioners expelled Horowitz from medical school largely on charges of misconduct, this principle is applicable and the procedural mandates of due process were required.

A review of the reasons for the dismissal demonstrates that Horowitz was expelled chiefly on account of misconduct. As the Eighth Circuit indicated, "[h]er academic (as opposed to practical) performance certainly gave no cause for complaint." (A. 49-50). She was expelled because the authorities empowered to take that action found fault with her "clinical competence, peer and patient relations, personal hygiene, and ability to accept criticism."

Lower courts have grappled with the issue of what constitutes "misconduct" for the purpose of determining the application of due process safeguards. For example, in Brookins v. Bonnell, 362 F.Supp. 379, 382 (E.D. Pa. 1973), the court held that where the reasons for dismissal relate primarily to a failure to conform to school regulations, such matters are not "academic" for constitutional purposes and the due process required in misconduct cases must be afforded. The court reasoned that misconduct is characterized by the fact that its determination rests on questions of fact whose resolution requires no "reference...to a standard of achievement in an esoteric academic field." Id. at 383. The reasons cited for Horowitz's expulsion rest on disputed issues of fact to which

scholastic standards and expertise are largely irrelevant. These issues include whether Horowitz met clinical responsibilities on time and "gracefully" (A. 51); in the realm of peer relations, whether her physical appearance, a slight speech impediment, and a limited wardrobe were such that they subjected her to group derision (A. 168-173); whether her fingernails were dirty (A. 156); and how she responded when faced with criticism (A. 51).

Only Horowitz's alleged clinical deficiencies present an arguably academic reason for her dismissal, inasmuch as a medical student's clinical behavior may be judged by standards peculiarly relevant to physicians. But the primary basis for Horowitz's dismissal does not involve such academic matters, but relates instead to matters of personal appearance and deportment. Therefore, since the essence of the dismissal was based upon charges of misconduct, the mandates of procedural due process should apply. Cf., Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975).

B. Even if the grounds for the dismissal are characterized as primarily "academic," the nature of the relief sought will not require improper judicial interference in academic matters.

Some lower courts have refused to subject "academic" dismissals to due process scrutiny on the ground that courts should

not re-evaluate a student's academic performance, or on the ground that such dismissals present issues of such a nature that requiring a due process hearing would be futile. But the respondent here does not ask the Court to re-evaluate her academic performance. She does, however, ask for a hearing, and the questions presented by the charges against her are amenable to resolution in such a hearing. There are many spheres in which the Court has ruled that the procedural safeguards of due process apply, without interfering with or determining the specific evaluations to be made through the process required. The reasons for judicial refusal to re-evaluate a student's adademic performance do not justify a refusal to scrutinize the process by which that performance is judged.

In Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975), the Eighth Circuit found that the procedural mandates of the due process clause apply to the expulsion from medical school of a student who failed two courses:

> It is true that courts will ordinarily defer to the broad discretion vested in public school officials and will rarely review an educational institution's evaluation of the academic performance of its students. Notwithstanding this customary "hands-off" policy, judicial intervention in school affairs regularly occurs when a state educational institution

> acts to deprive an individual of a significant interest in either liberty or property. It is well established that when such a deprivation occurs the procedural safeguards embodied in the Fourteenth Amendment are called into play, and courts will not hesitate to require that the affected individual be accorded such protection.
> Id. at 7 (citations omitted).

See also, Gaspar v. Bruton, supra. */

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*/ In Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976), however, the Fifth Circuit held that notice and a hearing are not required when a student is dismissed for acadmic reasons. In doing so, the Court improperly relied on two earlier Fifth Circuit cases. Dixon v. Alabama State Board of Education, supra, and Wright v. Texas Southern University, 392 F.2d 728 (5th Cir. 1968). Wright did not even consider a procedural due process claim brought by those students in the case who were dismissed for academic failure. Dixon addressed academic dismissals only with regard to the form of process required in dismissals for misconduct and then only by way of contrast. The Dixon court did not indicate that courts could not review the procedures utilized in dismissals for academic reasons.

To be sure, there are many cases where lower courts have stated that they will not engage in a process of re-examining academic evaluations that school officials have made with a goal of overturning those judgments and re-instating the student. See e.g., Connelly v. University of Vermont and State Agricultural College, 244 F.Supp. 156 (D.Vt. 1965); Keys v. Sawyer, 353 F.Supp. 936 (S.D. Tex. 1973). Brookins v. Bonnell, supra; Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 102 N.E. 1095 (1913); Edde v. Columbia University, 8 Misc. 2d 795, 168 N.Y.S. 2d 643 (Sup. Ct. 1957). As the court said in Keys v. Sawyer:

> Federal courts should not interfere or substitute their judgment and authority for that of local and state school authorities unless such action is clearly warranted to protect rights guaranteed by the Constitution... The gravamen of plaintiff's complaints is the basic unfairness of grading systems employed by two individual professors. It is difficult to imagine an area of academic life more suitable for judicial abstention. 353 F.Supp. at 939.

But we do not understand the respondent to quarrel with this principle. Indeed, there are sound reasons for courts generally to decline to redetermine a student's grade or the value of a dissertation. However,

this deference cannot preclude judicial scrutiny of the procedure by which a student is expelled. Such scrutiny calls for constitutional, not academic, expertise and it in no way interferes with instruction.

Procedural scrutiny of Horowitz's expulsion for its conformance to due process requirements does not rperesent an impermissible intrusion into educational affairs. There is ample precedent for this Court to apply the procedural mandates of due process to a sphere of decision-making in which the courts will not intrude to render the decisions themselves. See Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, supra. Moreover, the Court has subjected the actions of tax-supported educational institutions to procedural due process scrutiny in the past when such actions infringed protected interests. Goss v. Lopez, supra; Perry v. Sindermann, 408 U.S. 593 (1972). Indeed, it is even established that courts may review academic dismissals for their conformance to the requirements of substantive due process by assessing whether dismissal was arbitrary, capricious or in bad faith. E.g., Mahavongsanan v. Hall, supra; Depperman v. University of Kentucky, 371 F.Supp. 73 (E.D. Ky. 1974); Wong v. Regents of the University of California, 15 Cal. App. 3d 884, 93 Cal.Rptr. 502 (Ct. App. 1971). Accordingly, there is no sound reason why the courts should not subject even a dismissal for academic reasons to procedural due process review when protected interests are infringed, as some

circuits have done. E.g., Gaspar v. Bruton, supra; Greenhill v. Bailey, supra.

In short, the procedural due process ruling that respondent seeks will not result in novel or intrusive interference with the proper functions of academic officials.

CONCLUSION

For the reasons set forth herein, the judgment below should be affirmed.

Respectfully submitted,

JOEL M. GORA
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

Attorney for Amici Curiae*/

Ellen Dresselhuis
c/o Women's Equity Action League
Educational and Legal Defense Fund
733 15th Street, N.W.
Washington, DC 20005

Of Counsel

August 1977

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*/ Counsel for amici curiae wish to express their appreciation to Susan M. Wolf, a first-year student at Yale Law School, for her assistance in the preparation of this brief.